LEGISLATIVE POWER TO DETERMINE QUALIFICATIONS FOR PUBLIC OFFICE.—The decision of a recent Iowa case, *State* v. *Sargent* (Ia. 1910) 124 N. W. 339, holding constitutional a statute providing that certain officers should be selected from the two dominant political parties raises anew the question of the extent of the legislature's power to prescribe qualifications for public office. It is undoubtedly true that regardless of whether or not the office originates in the constitution this power is in general vested in a state legislature.[1] In its exercise, however, the legislature is, of course, subject always to the supreme authority of the constitution, and, consequently, if that instrument has prescribed the tests by which elegibility is to be determined the legislature has no power to increase or diminish the tests so established.[2] It does not follow, however, that because the constitution omits to indicate qualifications[3] or provides such as are not in their nature exclusive[4] that its framers were unmindful of the importance of having only suitable persons in positions of public trust. In such cases, therefore, the legislature may establish such tests as will secure the most faithful and efficient performance of public duties[5] or as will best accord with the general public policy.[6] Accordingly, tests relating to character,[7] ability,[8] and residence[9] have uniformly been held proper. It seems, therefore, that the qualifications should relate primarily to the duties of the office, and to the extent that they are designed to determine the candidate's fitness to properly perform these duties the legislative power is undoubted, provided the test of such fitness be reasonable.

It is generally said, however, that the right to hold office is in all cases a privilege granted by the legislature rather than a right preserved to the individual by the constitution.[10] Although it is true that, save in exceptional instances, the state constitutions omit to designate the tests by which eligibility is to be determined, it does not seem a necessary conclusion from this fact alone that the power of the legislature is absolutely unrestrained. In defining the limitations on legislative authority, the general spirit and purpose of the constitution is undoubtedly as determinative as are its express provisions,[11] and in passing on questions of eligibility to office the courts have not hesitated to appeal to these fundamental principles.[12] Accordingly, even in the absence of express constitutional provision it has been declared inconsistent with the general spirit of our institutions that an alien should hold office,[13] or that a woman should be appointed jus-

[1]Throop, Public Officers 73.

[2]State *v.* Holman (1894) 58 Minn. 219; Thomas *v.* Owens (1853) 4 Md. 189.

[3]State *v.* George (1887) 23 Fla. 585.

[4]Darrow *v.* People (1885) 8 Colo. 417.

[5]Caldwell *v.* Wilson (1897) 121 N. C. 425.

[6]Sheehan *v.* Scott (1905) 145 Cal. 684.

[7]Barker *v.* People (N. Y. 1824) 3 Cow. 686.

[8]People *v.* Loeffler (1898) 175 Ill. 585.

[9]Sheehan *v.* Scott *supra.*

[10]Meecham, Public Officers 64.

[11]Rathbone *v.* Wirth (1896) 150 N. Y. 459; Throop, Public Officers 73.

[12]People *v.* Alberton (1873) 55 N. Y. 50.

[13]State *v.* Van Beek (1893) 87 Ia. 669.

tice of the peace.[14] Moreover, it is an undoubted principle of our system that all citizens should have a right to participate in public politics[15] and that with regard to this and all other rights and privileges they should not be prejudiced by reason of political opinion.[16] Thus it would seem that both the individual and the public generally have a right to demand that those indisputably fit, be considered. Relying on these principles it has even been said that eligibility to office follows as a just deduction from our system, and that consequently the legislature cannot establish arbitrary exclusions from office.[17]

Although, according to the weight of the more recent judicial opinion, it cannot be affirmed that the constitution preserves eligibility to office as the absolute right of its citizens, yet it seems, as suggested by the case last cited, that the legislative power does not extend to the establishment of such tests as will grant the privilege of eligibility to one class to the exclusion of all others.[18] It is undoubtedly a fundamental principle that the rights and even the privileges incident to citizenship should be granted alike to all and the constitutions recognizing this principle are explicit in condemning class legislation. It seems, therefore, and the courts have not infrequently declared, that tests which, without reference to fitness and ability, exclude a class of citizens from eligibility solely on the ground of political opinion are repugnant to the constitution and therefore void.[19]

It is evident that the statute involved in the Iowa decision makes party allegiance the determining test of eligibility and virtually works an exclusion of all those who presist in a contrary political faith. Under the theory of the court, placing its decision on the ground that citizens, even if fit, have no right to complain when excluded from eligibility, it must be conceded, it seems, that the power of the legislature is, in this respect, practically unlimited.

Surely, if the opinion of the majority properly indicates the scope of legislative power it is difficult to see why it could not limit the selection to any one political party or even to a particular clique or faction of that party. Having done this, it may apparently further limit the selection to the point where the statute so abridges the discretion of the appointing power as to virtually effect the appointment itself. It is impossible to say that the power of the legislature could properly be carried to this point, yet such seems to be the logical deduction from the theory supported by the majority opinion. But if, on the other hand, it could be said that the decision were based on the ground that the qualifications imposed were a reasonable test of fitness it would, of course, be impossible to argue that the power of the legislature must logically extend to the point indicated, for the court would undoubtedly declare that such limitations are not included within the notion of a reasonable test. To this position it can only be

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[14]Opinion of the Justices (1871) 107 Mass. 604.

[15]Louthan *v.* Comw. (1884) 79 Va. 196.

[16]Atty. Genl. *v.* Board (1885) 58 Mich. 213.

[17]Barker *v.* People *supra.*

[18]Brown *v.* Russell (1896) 166 Mass. 14; Cooley, Const. Limit. (6th ed.) 481.

[19]Rathbone *v.* Wirth *supra;* Bowden *v.* Bedell (1902) 68 N. J. L. 451; Evansville *v.* State (1888) 118 Ind. 426; Atty. Gen. *v.* Board *supra;* Meecham, Public Officers 98; State *v.* Denny (Ind. 1889) 4 L. R. A. 65.

objected that under our system of government political opinion is obviously no test of fitness, as herein defined, and that consequently the imposition of such qualifications is without the power of the legislature.

THE EFFECT ON A PROMISSORY NOTE OF A STIPULATION FOR ATTORNEY'S FEES IN THE MORTGAGE SECURITY.—Various effects have been ascribed to a stipulation in a promissory note that the maker will pay attorney's fees if the collection of the note at maturity necessitates legal proceedings. Such an agreement has been deemed usurious, principally in jurisdiction where statutes prescribe specifically the cases in which costs are recoverable.[1] This theory, however, disregards the intention of the parties, essential to usury,[2] and presumes that means adapted to the oppression of the borrower have in fact been oppressively employed.[3] Moreover, the debtor can escape the additional burden by meeting his just obligation at its maturity, and no contract is usurious if at maturity principal and lawful interest will discharge the contract according to its terms.[4] It has been argued further that the creditor gets nothing since his expenditures rendered necessary by the debtor's default usually outrun the benefit procured by the stipulation.[5]

A second theory recognizes this device as a means for oppressing the borrower, and, separating the stipulation for attorney's fees from the note, holds it void as a penalty.[6] This apparently carries the principal of solicitation for the debtor too far for there is nothing oppressive in a provision for indemnity against a possible loss due to the debtor's default,[7] and to insure this character to such a provision all courts require the amount to be reasonable.[8] Moreover, the right to make such a contract is as clear as that to make any contract not prohibited by law or opposed to sound policy.[9]

The third view involves the effect of such a provision on the negotiability of the note. It is argued that brevity and freedom from collateral stipulations are essential to negotiability,[8] that the sum payable must be certain not only before, but also after maturity, and that the stipulation for attorney's fees violates these conditions.[9] This, however, seems erroneous. Certainty is required only because such instruments are substitutes for money, but as they lose this character at maturity certainty thereafter is not essential. Therefore, since the provision in question only becomes operative after

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[1]State of Ohio *v.* Taylor (1841) 10 Ohio 378; Dow *v.* Updike (1881) 11 Neb. 95.

[2]Tyler, Usury 103.

[3]Wilson Sewing Machine Co. *v.* Moreno (1879) 6 Sawy. 35.

[4]Gaar *v.* Louisville Banking Co. (Ky. 1874) 11 Bush 180; Peyser *v.* Cole (1883) 11 Ore. 39.

[5]Peyser *v.* Cole *supra.*

[6]Witherspoon *v.* Musselman (Ky. 1878) 14 Bush 214; Bullock *v.* Taylor *et al.* (1878) 39 Mich. 137.

[7]Peyser *v.* Cole *supra.*

[8]Woods *v.* North *et al.* (1877) 84 Pa. St. 407.

[9]Sylvester Bleckley Co. *v.* Alewine (1896) 48 S. C. 308; Jones *v.* Radatz (1880) 27 Minn. 240.